IN THE HIGH COURT OF JUDICATURE AT BOMBAY
APPELLATE SIDE
CIVIL REVISION APPLICATION NO. 29 OF 2005

Sou. Bageshree Miliind Kshirsagar
& ors. Applicants

Vs.

Smt.Shanta Vasant Deshpande & ors. Respondents

Mr.S.V.Pitre for applicants.
Mr.K.K.Malpathak for Resp.Nos.1 to 7.

CORAM: B.H.MARLAPALLE,J.
June 20, 2005.

ORAL ORDER:

1. Heard Mr.Pitre, the learned counsel for the applicants and Mr.Malpathak, the learned counsel for the respondent nos.1 to 7. Leave to delete respondent nos.8 and 9 who are the formal parties for deciding the revision application.

2. Rule. Mr.Malpathak waives service for the respondents.

3. The applicant nos. 1 to 4 had initially filed Special Civil Suit No.1114 of 1997 in the Court of Civil Judge Senior Division at Pune against present respondent nos.1 to 5 seeking a declaration that the plaintiffs are the owners of the property described

in the the schedule to the plaint. The present respondent nos.1 to 5 filed Special Civil Suit No.509 of 1998 in the very same Court for possession of the very same property i.e. suit property in Special Civil Suit No.1114 of 1997. The present applicants are claiming to exercise their rights on the basis of the purported Will executed by the deceased Madhukar Shankar Pattihal on 22-5-1995 whereas the present respondent nos.1 to 5 are seeking to exercise their right on the basis of they being the L.Rs. of late Madhukar's brother. Madhukar and his wife died issueless and the applicants claim Madhukar's property on the basis of the Will whereas the present respondent nos. 1 to 5 claim that most of these properties set out in the Will and more particularly the immovable property was ancestral property and they being the L.Rs. of Madhukar's brother, are entitled to inherit the same.

4. In Special Civil Suit No.509, present applicants who are the defendants in the said suit, submitted an application under Section 9A regarding jurisdiction of the Court to entertain and try the suit and limitation. The trial Court answered the issue of jurisdiction in the affirmative and the

issue of limitation in the negative, i.e. in favour of the plaintiffs by the impugned order dated 20-11-2004.

5. Though the reasoning set out by the trial Court in support of the impugned order appears to be in order, the issue of jurisdiction on the facts and in the circumstances of this case could not have been appropriately decided unless parties proceeded to lead the evidence. There are two basic documents which are material in support of the contentions raised by the respective parties, (1) the Probate on the basis of the Will at Exhibit 71 and whether late Madhukar could be treated an absolute owner of the property he purportedly inherited from his father and (2) the Will executed by Madhukar on 22/5/1995. It is only by way of the oral and documentary evidence that has to be adduced by the respective parties the trial Court can consider the respective status as well as the claim in the suit property. It would be, therefore, necessary that the issues of jurisdiction and limitation are remitted back to the trial Court for fresh decision after the parties lead evidence in support of their respective claims.

6. In the premises this application succeeds partly and the impugned order dated 20-11-2004 passed below Exhibit 1 in Special Civil Suit No.509 of 1998 is hereby quashed and set aside. It is directed that the issues regarding jurisdiction and limitation would be decided afresh along with other issues after the parties adduce evidence and the said two issues would also undoubtedly be decided as preliminary issues.

. In case one of the parties apply to the learned District Judge for clubbing the two suits, the said application shall be decided within a period of four weeks by the learned District Judge and it is clarified that the preliminary issues will be decided without being influenced by any observations made in the impugned order.

7. Rule made absolute accordingly with no order as to costs.

8. Writ to go forthwith to the Courts below.

(B.H.MARLAPALLE,J.)